GOOD AND BAD TRUSTS

THE term "trusts" has now come to refer to extensive combinations of capital in the commercial and industrial world, regardless of what the form of the organization may be. The combination may be by the agreement of the units combining that they will sell through a common board or committee,[1] or by the device of trustees holding under a trust agreement stock controls in subsidiary corporations, or the controlling interests in partnerships and other forms of industrial and commercial units,[2] or by a parent corporation holding stock controls in subsidiary corporations,[3] or by the actual purchase of plants and their operation as a single industrial unit by a single corporation.[4] In describing the size of the combination which is sufficient to warrant its being called a "trust," we may adopt the phraseology of the government in its brief in the *International Harvester* and *Steel Cases*. The combination to be a trust must embrace "units which together occupy a preponderant position in a given industry." To ask whether a trust is good or bad is only to ask where the line shall be drawn between combinations which are legal and those which are illegal. It will be convenient in the beginning to indicate, first those that are clearly illegal, and then those that are clearly legal. By this process we shall arrive at the debatable ground.

I

Since the *Standard Oil* and *Tobacco Cases*,[5] it has become articulate that a combination of capital (in whatever form) which, by

[1] This was the form of the combination attacked by the government in United States *v.* Addyston Pipe & Steel Co., 85 Fed. 271 (1898); Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211 (1899).

[2] This was the form of the combination known as the Standard Oil Trust under the Standard Oil Trust agreement of 1882. State *v.* Standard Oil Co., 49 Oh. St. 137, 30 N. E. 279 (1892); Standard Oil Co. *v.* United States, 221 U. S. 1 (1910).

[3] This was the form of organization of the Standard Oil Company of New Jersey as it was reorganized in 1899. Standard Oil Co. *v.* United States, 221 U. S. 1 (1910).

[4] This was the form of the combination of the International Harvester Company. United States *v.* International Harvester Co., 214 Fed. 987 (1914).

[5] Standard Oil Co. *v.* United States, 221 U. S. 1 (1910); United States *v.* American Tobacco Co., 221 U. S. 106 (1910).

reason of its size and preponderant position in the business, has the power and the purpose, or uses its power to exclude others from the business by illegal acts and unlawful and unfair methods of competition, is an attempt at monopoly, and a restraint of trade and illegal at common law, and, if interstate commerce is involved, under the Sherman Act. It is what may be called a bad trust.[6]

It seems incredible that anyone ever should have doubted the soundness of this proposition. The common-law conception of monopoly was that of a business carried on to the exclusion of others.[7] Formerly this was effected by the exercise of the proper governmental authority which directly excluded all but the favored person from carrying on the business and imposed penalties upon anyone who violated the excluding mandate. When, however, the crown attempted to grant the privilege of carrying on a trade exclusively of all others its action was held void in the *Case of Monopo-*

[6] Continental Wall Paper Co. *v.* Voight & Sons Co., 212 U. S. 227 (1908); United States *v.* Motion Picture Patents Co., 225 Fed. 800 (1915) (*semble*); United States *v.* Eastman Kodak Co., 226 Fed. 62 (1915); 230 Fed. 522 (1916); United States *v.* Corn Products Refining Co., 234 Fed. 964 (1916); Dunbar *v.* American Telephone Co., 224 Ill. 9, 79 N. E. 423 (1906); 238 Ill. 456, 87 N. E. 521 (1909); Distilling & Cattle Feeding Co. *v.* People, 156 Ill. 448, 41 N. E. 188 (1895); Arnot *v.* Pittston & Elmira Coal Co., 68 N. Y. 558 (1877).

One of the early examples of combination (often on rather a small scale) which had the purpose to exclude others by means of an unlawful excluding practice, is found in the cases where several competitors secretly combined and eliminated competition, while pretending to the public to be competing. Craft *v.* McConoughy, 79 Ill. 346 (1875); Fairbank *v.* Leary, 40 Wis. 637 (1876). This device obviously deceived the public and tended to keep others out of the business, since one would be less likely to enter a field already occupied by a considerable number of competitors, than if obliged to contend with only one other unit.

On the same principle the secret combination of bidders not to bid against each other at an auction is illegal. Gibbs *v.* Smith, 115 Mass. 592 (1874); Woodruff *v.* Berry, 40 Ark. 251 (1882); National Bank of the Metropolis *v.* Sprague, 20 N. J. Eq. 159 (1869).

[7] 3 INST. 181; Kellogg *v.* Larkin, 3 Pinney (Wis.) 123 (1851).

Chappel *v.* Brockway, 21 Wend. (N. Y.) 157, 163 (1839). ("The defendant can gain nothing by giving the transaction a bad name, unless the facts of the case will bear him out. He calls this a monopoly. That is certainly a new kind of monopoly which only secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise.")

The California Steam Navigation Co. *v.* Wright, 6 Cal. 258 (1856) (last quotation approved); HAWK. P. C., bk. 1, ch. 29 (quoted in the opinion of the court in Standard Oil Co. *v.* United States, 221 U. S. 1 (1910); Mitchel *v.* Reynolds, 1 P. Wms. 181 (1711). See also the many cases where the absence of any exclusion of others is noted as minimizing the tendency toward monopoly. *Infra*, note 17.

lies.[8] In this decision the policy of the common law against monopoly in the sense of a special privilege to carry on a business to the exclusion of all others was established and found effective to nullify the grant of the crown. Quite recently large aggregations of capital occupying a preponderant position in the business have discovered that they possess a power (resulting from their size) to indulge in practices which actually operate to exclude smaller units from the field. Some of these were plainly unlawful, such as inducing another trader to break his contract, fraud, libel, intimidation, coercion, and transportation rebates. These may be called "unlawful competition." [9] Other excluding practices were more subtle and have become known as "unfair methods of competition." They are methods which may be lawful and proper when used by one unit against another which can retaliate on fairly even terms with the same methods.[10] They become unfair and unlawful at least when used by a unit occupying a preponderant position against a smaller one, which, because it is smaller, cannot retaliate effectively. Of these the most obvious and best known is "local price-cutting." [11] The large unit can put the small one out of business by price-cutting below cost in the locality or the market which the smaller unit serves. By thus demolishing each small unit singly, it may exclude all from the field. This was not, of course, as effective as an act of Parliament. Such methods might never result in an actual monopoly. But they were effective to accomplish enough in that direction to be an illegal attempt at monopoly. If the crown was denied on grounds of public policy any power to grant an exclusive privilege to carry on a business, is it not quite plain that a similar privilege granted by a "trust" to itself would be an illegal attempt at monopoly and a restraint of trade entirely contrary to the common law, and, if interstate commerce was involved, void under the Sherman Act?

The fact that the mere combination of competing railroads, or other competing public service corporations operating under special franchises, is illegal at common law and under the Sherman Act,

[8] 11 Rep. 84 (1603).

[9] See WYMAN, CONTROL OF THE MARKET, 36 *et seq.*

[10] Mogul Steamship Co. *v.* McGregor, Gow & Co., [1892] A. C. 25.

[11] Other methods of unfair competition are listed and explained in an admirable article on Unfair Competition by William S. Stevens, 29 POL. SCI. QUART. 282, 461.

without regard to any purpose to monopolize, or excluding practices,[12] is an application of the principle which underlies the *Standard Oil* and *Tobacco Cases.* Railroads and many other public utilities cannot be constructed and operated without special legislative authority, the exercise of the right of eminent domain, and the right to use or cross the public streets and highways. It follows that the very nature of the business and the special privileges required are such that it is against the public interest to allow anybody and everybody to engage in it. It follows that one who is given the special privileges required is protected by the proper governmental authority from any competition. The exclusion of the public is supplied by the State just as clearly as where an act of Parliament granted to A. the exclusive privilege of carrying on a business and penalized all others who attempted to do it. If several persons are permitted to construct and operate the public utility in question on a competitive basis, they are still protected from any competition on the part of others. The field of this sort of business is unfree. Furthermore, the fact that several are permitted to operate a public utility in competition is a determination by the public authorities that competition between the units in the field is desirable. Under such circumstances the elimination of any existing competition between any of the units is, in and of itself, illegal. It defies the policy determined by the public authorities who have permitted a number of competitors to enter the field. It tends directly to produce monopoly regardless of any excluding purposes or practices because the exclusion of others is provided for by the non-action of governmental authority.

It is entirely possible that the public may be excluded from a given business by the conditions under which it is carried on or by an actual limitation of a natural resource or both. Thus, if several competitors controlled all the known mineral deposits of a certain sort, it might be that any combination between them would be

---

[12] United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290 (1896); United States *v.* Joint-Traffic Ass'n, 171 U. S. 505 (1898); Northern Securities Co. *v.* United States, 193 U. S. 197 (1903); United States *v.* Union Pacific R. Co., 226 U. S. 61, 470 (1912); Gibbs *v.* Consolidated Gas Co. of Baltimore, 130 U. S. 396 (1888); People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798 (1889); Chicago Gas Light Co. *v.* People's Gas Light Co., 121 Ill. 530, 13 N. E. 169 (1887); Chic. M. & St. P. Ry. Co. *v.* Wabash, St. L. & P. Ry. Co., 61 Fed. 993 (1894); Texas & Pac. Ry. Co. *v.* Southern Pac. Ry. Co., 41 La. Ann. 970, 6 So. 888 (1889).

illegal. Certainly any combination which resulted in one having a preponderant position in the business might be regarded as, in and of itself, illegal. The field would be inherently unfree at the time the combination occurred. So those who controlled the only mineral deposits which were, on account of the transportation cost from other sources, practically available for a certain considerable area, might not be permitted to combine to the extent of conferring upon one unit a preponderant position in that business.[13] The so-called necessaries of life must be had for use at once, or within a brief space of time. There may be a sufficient quantity on hand in the world at large, but the users cannot wait to have reserves brought up from a distance. There will be an ample supply after the next year's crops are harvested, but the population must have the present supply before that time. Such circumstances create the excluding conditions. Hence, a combination which attempts to secure the reserves of such supplies at any given point, and goes so far at least as to secure a preponderant position in the control of the market, has all the elements of an illegal attempt at monopoly. During the time that the supplies acquired are needed, the market is not free. All but those actually in it are excluded. The only protection of the public from monopoly prices is the maintenance of the *status quo* of existing competitions, or at least the prevention of any sudden and violent change in the competitive status of the units engaged. This is the basis for the illegality of the so-called "corner." [14] It makes no difference, of course, whether there is involved merely the union of properties by purchase, or of properties and managers by combination.

II

Where a business is normally free to all to enter and no excluding conditions exist and no excluding practices are indulged in, it is clear that there may be a great deal of lawful combination among competitors which necessarily eliminates competition between the units combined. Indeed, it may safely be affirmed that all such combinations which do not result in a unit occupying a "preponderant position in the industry" are valid. This is clear where the combination

[13] See Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173 (1871); Cummings *v.* Union Blue Stone Co., 164 N. Y. 401, 58 N. E. 525 (1900).

[14] Raymond *v.* Leavitt, 46 Mich. 447, 9 N. W. 525 (1881); Samuels *v.* Oliver, 130 Ill. 73, 22 N. E. 499 (1889).

of properties occurs by the purchase of the business of one competitor by another, and where not only is the sale valid, but a restrictive covenant on the part of the seller not to carry on the same business is also upheld.[15] So where the combination occurs by uniting not only the properties which formerly competed, it is valid and restrictive covenants on the part of the managers combining not to compete have been upheld.[16] These cases indicate that where

[15] Nordenfelt *v.* Maxim Nordenfelt Guns & Ammunition Co., [1894] A. C. 535; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419 (1887); Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363 (1888); Wood *v.* Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357 (1901); United States Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946 (1894); Kellogg *v.* Larkin, 3 Pinney (Wis.) 123 (1851); Chappel *v.* Brockway, 21 Wend. (N. Y.) 157 (1839); Van Marter *v.* Babcock, 23 Barb. (N. Y.) 633 (1857); Moore & Handley Hardware Co. *v.* Towers Hardware Co., 87 Ala. 206, 6 So. 41 (1888); Beard *v.* Dennis, 6 Ind. 200 (1855); California Steam Navigation Co. *v.* Wright, 6 Cal. 258 (1856); Hubbard *v.* Miller, 27 Mich. 15 (1873); Mapes *v.* Metcalf, 10 N. D. 601, 88 N. W. 713 (1901); National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806 (1891); Wickens *v.* Evans, 3 Y. & J. 318 (1829).

[16] Dolph *v.* Troy Laundry Machinery Co., 28 Fed. 553 (1886); United States *v.* Nelson, 52 Fed. 646 (1892); Robinson *v.* Suburban Brick Co., 127 Fed. 804 (1904); United States *v.* Quaker Oats Co., 232 Fed. 499 (1916) (especially opinion of Mack, J.); Ontario Salt Co. *v.* Merchants Salt Co., 18 Grant (U. C.) 540 (1871); Central Shade Roller Co. *v.* Cushman, 143 Mass. 353, 19 N. E. 629 (1887); Gloucester Isinglass & Glue Co. *v.* Russia Cement Co., 154 Mass. 92, 27 N. E. 1005 (1891); Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 50 N. E. 509 (1898); Skrainka *v.* Scharringhausen, 8 Mo. App. 522 (1880); Meredith *v.* Zinc & Iron Co., 55 N. J. Eq. 211, 37 Atl. 539 (1897); Marsh *v.* Russell, 66 N. Y. 288 (1876); Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973 (1894); Queen Ins. Co. *v.* State of Texas, 86 Tex. 250, 24 S. W. 397 (1893); Sayre *v.* Louisville Union Benevolent Ass'n, 1 Duvall (Ky.) 143 (1863); Jones *v.* North, L. R. 19 Eq. 426 (1875). In United States *v.* International Harvester Co., 214 Fed. 987 (1914), the court said, p. 999: "If the five companies which formed the International had been small, and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in restraint of trade, but in the furtherance of it; . . ." In the brief of the government presented to the United States Supreme Court in the same case it is conceded: "Nor was it intended to prohibit *all* combinations of competing units, but only such as are sufficiently important and comprehensive to bear some reasonable relation to the evils — the breakdown of the competitive system, etc. — against which the Act was designed to guard." On page 99, in summing up, the same brief states: "It [the Sherman Act] permits combinations of competitive units within limits." *Contra*, Slaughter *v.* The Thacker Coal & Coke Co., 55 W. Va. 642, 47 S. E. 247 (1904) (where, however, the opinion of the court was delivered by the dissenting member, who sets forth in full the reasons against the decision).

Not infrequently it is difficult to say whether there has been a combination by the sale of properties to a competitor, or a combination of properties and managers as well. For instance, when a new corporation is formed and the properties of several competing units are transferred to it in return for stock which is distributed to the stockholders or the owners of the property sold, the transaction may be looked upon as a combina-

the combination does not occupy a preponderant position in the business, and there are no excluding purposes or practices, the mere elimination of competition between the units is not a ground for holding it illegal. The common law certainly has never attempted to put out a rule which would compel the maintenance of the *status quo* of every existing competition by enforcing general restraints on alienation to, and upon the freedom to contract and unite with, competitors. Neither has any court suggested that any difference of result could be made between a combination of properties which had competed, and a combination both of competing properties and managers as well. Imagine anyone objecting that all the partnerships of competing lawyers, bankers, and corner groceries were necessarily illegal because they were combinations of competing properties and managers which eliminated competition between them! Imagine anyone upholding a public policy in favor of the owner of a business having the privilege of selling his property with the greatest freedom at the best price obtainable, who would not admit the existence of the same policy in favor of a man in business selling his services and experience on the same terms!

The authorities which uphold the legality of combinations, whether of properties alone, or of properties and managers, where the combination does not result in a unit occupying a preponderant position in the business, are clearly sound.

Of course there is in every such case the elimination of competition between the competing units combined. This is not less in the case of the union of the properties by sales and the restriction by covenants not to compete, exacted from the sellers, than it is where the properties and the managers themselves are united. In both alike competition between the property and the managers is ended, at least for the time being. This, of course, tends in some degree toward monopoly. So long, however, as the combination does not

tion of properties merely, the managers of the selling units going out of the business, or it may be that the managers of the selling units remain in the business, taking part as officers of the new corporation. Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973 (1894). So where two units in the same business agree to divide the territory and make reciprocal covenants with each other not to do business in the territory assigned to the other, the transaction may be looked at either as a sale of part of the business of each, and therefore a combination of properties only, or it may be looked at as a combination of properties and managers serving the entire field in a manner mutually arranged between them. Wickens *v.* Evans, 3 Y. & J. 318 (1829); National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806 (1891).

occupy a preponderant position in the business and there are no excluding purposes or practices,[17] much competition will remain,

[17] In the following cases, the absence of any exclusion of others from the business was noted as minimizing the tendency toward monopoly from the elimination of competition between the units combined.

Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 483, 13 N. E. 19 (1887). ("But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry";) Leslie *v.* Lorillard, 110 N. Y. 519, 534, 18 N. E. 363 (1888) (same language).

Wood *v.* Whitehead Bros. Co., 165 N. Y. 545, 551, 59 N. E. 357 (1901). ("But contracts between parties, which have for their object the removal of a rival and competitor in a business, are not to be regarded as contracts in restraint of trade. They do not close the field of competition, except to the particular party to be affected.")

Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 487, 28 Atl. 973 (1894). ("But combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule." Page 488: "But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies.")

Wickens *v.* Evans, 3 Y. & J. 318, 329 (1829). ("Not a monopoly, except as between themselves; because every other man may come into their districts and vend his goods." Page 330: "If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated; and the consequence would, perhaps, be, that the public would obtain the articles they deal in at a cheaper rate.")

National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 275, 47 N. W. 806 (1891). ("Neither one nor both of these companies have any exclusive right to engage in this business, it being one open to all. Hence this contract does not, and cannot, create any monopoly.")

United States Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946, 949 (1894). ("The facts of this case disclose no tendency to monopoly. Monopoly implies an exclusive right, from which all others are debarred, and to which they are subservient.")

Kellogg *v.* Larkin, 3 Pinney (Wis.) 123, 139 (1851). ("And while we have no privileged classes here, but little individual, and less associated capital, and while our resources are so imperfectly developed, while the avenues to enterprise are so multiplied, so tempting and so remunerative, giving to labor the greatest freedom for competition with capital, perhaps, that it has yet enjoyed, I question if we have much to fear from attempts to secure exclusive advantages in trade, or to reduce it to few hands." Page 145: "Now could the parties possibly have intended by this simple contract, to vest in the mill owners the sole exercise of the traffic in wheat, throughout the State of Wisconsin? . . . I say there was no monopoly intended, none effected. We cannot fail to perceive, that in spite of this contract, all the rest of Wisconsin was an open and unrestricted market for the sale of wheat. And even in Milwaukee, the market was open to the fiercest competition of all the world, except these obligors.")

Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 523, 43 Atl. 723 (1899). ("The entire capital of the country, except theirs, is free to be employed in the manufacture.")

Chappel *v.* Brockway, 21 Wend. (N. Y.) 157, 163 (1839). ("The defendant can gain nothing by giving the transaction a bad name, unless the facts of the case will bear him out. He calls this a monopoly. That is certainly a new kind of monopoly which only

and the progress toward monopoly will be comparatively slight. Such as may occur is entirely outweighed by the public interests which are subserved by permitting the combination.

First, there is the social interest in individual freedom of economic action. As applied to the situation under discussion this means that there is a public policy in favor of freedom to business managers and owners to run their business as they think best, combining with others or not, as they deem advisable. It is not infrequently spoken of as the fundamental policy in favor of freedom of contract, protected by the "due process" clause of our constitutions.[18]

---

secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise.") The California Steam Navigation Co. *v.* Wright, 6 Cal. 258, 262 (1856) (last quotation approved).

[18] Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 482, 13 N. E. 19 (1887). ("It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammeled by unnecessary restrictions.")

Leslie *v.* Lorillard, 110 N. Y. 519, 533, 18 N. E. 363 (1888). ("The object of government, as interpreted by the judges, was not to interfere with the free right of man to dispose of his property or of his labor.")

Wood *v.* Whitehead Bros. Co., 165 N. Y. 545, 551, 59 N. E. 357 (1901). ("In the present practically unlimited field of human enterprise there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business.")

National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 276, 47 N. W. 806 (1891). ("A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract.")

United States Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946, 949 (1894). ("In discussing this phase of the subject, we must not lose sight of some other principles, the disregard of which would be more harmful to public interest than monopolies. The right to contract is a cardinal element of constitutional liberty, and, as such, should be jealously guarded.")

Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 105, 50 N. E. 509 (1898). ("The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its good will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old.")

Smith's Appeal, 113 Pa. St. 579, 590, 6 Atl. 251 (1886). ("The principle is this: Public policy requires that every man shall not be at liberty to deprive himself or the State of his labor, skill or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to so sell it, it is necessary

Second, there is the use of the combination as a means of eliminating ruinous competition. Competition in trade and industry is constantly inimical to the public interest in two respects: It tends to develop too much competition and consequent loss to everyone in the business.[19] Too much competition and the intensity of com-

that he should be able to preclude himself from entering into competition with the purchaser.")

Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 514, 43 Atl. 723 (1899). ("A tradesman, for example, who has engaged in a manufacturing business and has purchased land, installed a plant, and acquired a trade connection and good will thereby, may sell his property and business with its good will. It is of public interest that he shall be able to make such a sale at a fair price and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold.") Kellogg *v.* Larkin, 3 Pinney (Wis.) 123 (1851).

[19] Leslie *v.* Lorillard, 110 N. Y. 519, 534, 18 N. E. 363 (1888). ("I do not think that competition is invariably a public benefaction; for it may be carried on to such a degree as to become a general evil.")

Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 487, 28 Atl. 973 (1894). (Agreement found to have been made on account of "a ruinous competition.")

Wickens *v.* Evans, 3 Y. & J. 318, 328 (1829). (Agreement made in view of the fact that the parties "had sustained great loss and inconvenience by reason of exercising their trade in the same places.")

National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 275, 47 N. W. 806 (1891). ("Excessive competition is not now accepted as necessarily conducive to the public good.")

Whitney *v.* Slayton, 40 Me. 224, 230–231 (1855). ("Whether competition in trade be useful to the public or otherwise, will depend on circumstances. I am rather inclined to believe, that, in this country at least, more evil than good is to be apprehended from encouraging competition among rival tradesmen, or men engaged in commercial concerns. There is a tendency, I think, to overdo trade, and such is the enterprise and activity of our citizens, that small discouragements will have no injurious effect, in checking in some degree, a spirit of competition.

"In this country, particularly, such is the facility with which persons are enabled, without capital, to embark in various enterprises, and such the desire to try experiments therein, that it often turns out, when these experiments have been successful, in some of these undertakings, others will enter into them in such numbers that ruin to most of them so engaged is the consequence. Hence those who retire, and for a proper consideration contract with others not to engage in any particular business for a limited time, and in a particular place, have often, if not generally, been the successful party.")

Chappel *v.* Brockway, 21 Wend. (N. Y.) 157, 164 (1839). ("Competition in business, though generally beneficial to the public, may be carried to such excess as to become an evil.")

Kellogg *v.* Larkin, 3 Pinney (Wis.) 123, 150 (1851). ("I believe universal observation will attest that for the last quarter of a century, competition in trade has caused more individual distress, if not more public injury, than the want of competition.")

Slaughter *v.* The Thacker Coal & Coke Co., 55 W. Va. 642, 650, 47 S. E. 247 (1904),

petitive methods may produce too little competition by eliminating others from the business. The competitive system looks to the operation of economic principles under freedom of action to avoid the evils of each extreme.[20] The freedom of others to enter the business prevents too little competition; the elimination of some competition from time to time prevents too much. A rule of law which made all sales to competitors, and all combinations of competitors, illegal, would leave the door open wide to an indefinite increase in competition, and at the same time obstruct the healthy lessening of competition. This would promote all the evils of too much competition in order to prevent the evils of too little. It would be a rule which encouraged competition only to require that the *status quo* of every existing competition be indefinitely retained. The public interest must suffer severely from any such rule. The unsuccessful competitor under it would in most instances be eliminated by a total failure and a maximum loss, instead of having a chance to save his loss by selling out to, or combining with, a more successful rival. Where the competitors were evenly matched all would be subjected indefinitely to a profitless competition or a maximum loss, instead of being permitted to combine and rescue their properties. Industrial depression, due to overproduction and to too many competitors, would necessarily right itself slowly and with a maximum of failures and losses.[21]

---

per Poffenbarger, dissenting. ("Competition is said to be the life of trade, but undue or excessive competition has been judicially declared hurtful and injurious to the public.")

[20] *Per* Pitney, V. C., in Meredith *v.* New Jersey Zinc & Iron Co., 55 N. J. Eq. 211, 221, 37 Atl. 539 (1897). ("Now, I am unable to find any foundation, either in law or in morals, for the notion that the public have the right to have these private owners of this sort of property continue to do business in competition with each other. No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact, the essential quality of that series of acts or course of conduct which we call competition is that it shall be the result of the free choice of the individual, and not of any legal or moral obligation or duty.") Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 19 (1887), *supra.*

[21] Oakdale Manufacturing Co. *v*, Garst. 18 R. I. 484, 487, 28 Atl. 973 (1894). ("But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure.")

Third, it can hardly be contended that mere combination and elimination of competition between the units combined creates exorbitant prices. What is the judicial test of an exorbitant or unreasonable price? There seems to have been an impression not entirely wanting in the judiciary that any rise in prices which follows a combination must be unreasonable. This is a shortsighted view. A moment's reflection should make it clear that general condemnation of advances in prices ultimately effects everyone unfavorably. It is equivalent to a general condemnation of prosperity. It is not the advance in prices which is objectionable, but only the unreasonable and excessive advance. In determining what prices are unreasonably high, are the courts to go into cost accounting and then add a percentage of profit and reach a specific finding as to what is an unreasonable price in any business under consideration? Obviously not. Such a course would be absurd and impracticable. The courts must find a workable and practicable general rule, the application of which will provide a wide margin of freedom to the business unit and a chance for the exceptional rewards which come from successful management. This leaves the courts no choice except to rely upon freedom to enter the business and freedom to continue in the business as the means of preventing excessive prices.[22] On the other hand they must allow combination to

[22] Dolph *v.* Troy Laundry Machinery Co., 28 Fed. 553, 555 (1886). ("Those who might be unwilling to pay the prices asked by the parties could find plenty of mechanics to make such machines, and the law of demand and supply would effectually counteract any serious mischief likely to arise from the attempt of the parties to get exorbitant prices for their machines. It is quite legitimate for any trader to obtain the highest price he can for any commodity in which he deals. It is equally legitimate for two rival manufacturers or traders to agree upon a scale of selling prices for their goods, and a division of their profits. It is not obnoxious to good morals, or to the rights of the public, that two rival traders agree to consolidate their concerns, and that one shall discontinue business, and become a partner with the other, for a specified term. It may happen, as the result of such an arrangement, that the public have to pay more for the commodities in which the parties deal; but the public are not obliged to buy of them. Certainly, the public have no right to complain, so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly.")

United States *v.* Nelson, 52 Fed. 646, 647 (1892). ("Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least.")

Slaughter *v.* The Thacker Coal & Coke Co., 55 W. Va. 642, 649, 47 S. E. 247 (1904),

some extent to prevent unprofitable prices and ruinous competition. The highest price which can be obtained while the business is free to all to enter and no one in it occupies, as a result of combination, a preponderant position, must be taken by the courts as fair. The fact that prices are higher than they were as a result of some combination which eliminates some competition, does not make those prices exorbitant.

Finally, and most important of all, is the interest of society in the carrying on of business by larger units. This is not only favored by public policy, but it is a condition to the existence of our present social order. It is as vital to the welfare of the country as that freedom of contract — freedom of the managers of business to manage without interference from the Legislature — which the due process clause of the Constitution protects.[23] In the last century one of the phases of our industrial revolution has been the shift from small to large business units. In a century individuals have been succeeded by partnerships, partnerships by corporations, corporations of small or limited capital by corporations with large capital. Acts which limited corporate capital have been succeeded by acts which place no limit upon the amount of capital. Acts which placed obstructions in the way of increasing capital have been succeeded in some states by acts which allow the corporation to increase its capital stock at will. The large corporation has been succeeded by the parent company which has been allowed already in some states to hold stock controls in subsidiary corporations. If we look at industry and commerce from the outward physical point of view, it is plain that the admittedly legal operating unit of today is, in every line, incredibly large in comparison with the unit of half a century ago. When we turn to the labor units we find the same process going on of shifting from the individual to the collective unit. The individual labor units have been combined to make the local unions, local unions have been combined to make the state-wide and country-wide labor units. Unions have been combined not only locally, and nationally, according to occupation, but terri-

---

per Poffenbarger, Pres. ("In the absence of some great combination, virtually controlling the production and price of a commodity in the country, the price is regulated and determined by the law of supply and demand.")

[23] "'Due Process,' the Inarticulate Major Premise, and the Adamson Act," 26 YALE L. J. 519, (May, 1917).

torially without regard to occupation. As one looks back upon what has been going on there can be no doubt that the social order has shifted from a primitive dependence upon the individual industrial unit to the collective unit, and then to the larger collective unit, and that the size of our industrial units has been magnified to an extraordinary degree. A very slight consideration of the matter makes it clear that to put commerce and industry back into the units of fifty, or even twenty-five years ago, would be to disrupt business and do an incalculable harm to the public welfare. Clearly, then, we may rely upon a strong public policy in favor of the shift from the individual and small collective unit to the larger collective unit.[24]

III

Suppose now that we have, in a business normally free, a combination which on the one hand has no intent to exclude others from the business and is guilty of no unlawful or unfair excluding practices, but which, on the other hand, "embraces units which together occupy a preponderant position in a given industry." Is this a good trust or a bad trust? Is it illegal at common law, and, if interstate commerce be involved, under the Sherman Act?

We may safely assume that when the Sherman Act refers to combinations "in restraint of trade" or attempts to monopolize, it refers to such combinations as were illegal at common law because they restrained trade or were attempts to monopolize.[25] But this

[24] Jones *v.* Clifford's Ex'r, 5 Fla. 510, 515 (1854). ("Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the Court, to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality. It made and conducts our government, constructs our railroads, our steam vessels, our magnificent ships, our temples of worship, structures for public and private use, our manufactories, creates our institutions for learning, builds up our cities and towns.

"Its very office is to do what individual exertion may not accomplish, and in a degree distinguishes civilized from savage life. Why then should this important agency be denied to this meritorious class of our citizens? They are in general men of small means, to whom an association may not only be desirable, but necessary and indispensable.")

[25] Standard Oil Co. *v.* United States, 221 U. S. 1 (1900). (After insisting "that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated," the opinion of the court proceeds as follows (p. 60): "Thus not specifying, but indubitably contemplating and requiring a *standard*, it follows that it was intended

does not carry us very far, because the common law, while it was clear about some results, gave no unequivocal answer to the problem now under consideration. Even if common-law authorities be found dealing with the point, nevertheless the Supreme Court of the United States is still entitled to declare for itself what the common law may be as a preliminary to applying the Sherman Act.[26] Hence the determination of the result in the case put will depend (apart from the question of whether interstate commerce is affected) upon considerations quite as much at large as if the case were being considered at common law.

The solution of our problem is to be attained by balancing the interests of the public and the parties involved.[27] In support of the legality of the combination is the public policy in favor of freedom to manage and carry on business, the elimination of ruinous competition, and the development of larger collective units. Against the legality of the combination is the tendency toward monopoly in the fact that competition between the units combined is eliminated. This, however, is minimized by the fact that there are no excluding purposes or unlawful or unfair excluding practices, and the field is free. Apart from the fact of size and preponderant position in the business the balance of interests is clearly in favor of the combination. The entire question is whether that balance is still maintained when we add the fact that the combination has a preponderant position in the business.

---

that *the standard of reason which had been applied at the common law* and in this country in dealing with subjects of the character embraced by the statute was intended to be the *measure* used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided." Again the court says (p. 62) " . . . the *criteria* to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the *rule of reason guided by the established law*, etc. . . .")

[26] Thus in Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373 (1911), the Supreme Court of the United States decided in effect that the common law forbade such contracts to keep up the price on resale as were there involved in spite of the fact that there were common-law decisions by respectable courts to the contrary: *i. e.* Grogan *v.* Chaffee, 156 Cal. 611, 105 Pac. 745 (1909); Elliman, Sons & Co. *v.* Carrington & Son, [1901] 2 Ch. 275 (damages allowed); Garst *v.* Charles, 187 Mass. 144, 72 N. E. 839 (1905) (injunction allowed against the defendant who secured a dealer to purchase for the purpose of breaking the contract upon a re-sale to the defendant); Garst *v.* Harris, 177 Mass. 72, 58 N. E. 174 (1900) (damages allowed); Clark *v.* Frank, 17 Mo. App. 602 (1885) (contract to maintain the price of thread); New York Ice Co. *v.* Parker, 21 How. Pr. (N. Y.) 302 (1861) (contract to maintain price of ice).

[27] Horwood *v.* Millar's Timber & Trading Co., [1917] 1 K. B. 305, 317, 318.

Three courses are open to the courts: *First*, they may hold the fact of size and preponderant position in the industry to be, in and of itself, sufficient to turn the balance against the validity of the combination. This will mean that there can be no good or bad trusts. All trusts, in the sense of large combinations or aggregations of capital, occupying a preponderant position in the business, would be bad trusts. No other combinations would properly be called trusts. *Second*, the courts, on the other hand, might regard the fact of size and preponderant position as insufficient, in and of itself, to turn the balance of interests against the validity of the combination. This would mean that there might be good and bad trusts. The bad trusts would be those which had the power and the purpose, or used their power, to exclude others by illegal and unfair methods of competition. The others would be good trusts. *Third*, between these extremes there is an intermediate position. Size and preponderant position may be regarded as *prima facie* evidence of an intent to exclude others, or to use the power of the combination to effect unlawful and unfair excluding practices, — thus shifting to the combination the burden of going forward with evidence to negative such intent and use of power. In this view there will still be good trusts and bad trusts. The line between them will be drawn at the place where they have the excluding purpose or practice illegal and unfair excluding methods. But size and preponderant position are still given an important effect as *prima facie* evidence of the excluding intent.

A

As to which of these positions the courts have taken, the cases are far from conclusive.

1. Several have adopted the second view, and sustained the legality of the combination.[28]

[8] Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723 (1899); United States *v.* Keystone Watch Case Co., 218 Fed. 502, 510 (1915). ("Size does not of itself restrain trade or injure the public; on the contrary, it may increase trade and may benefit the consumer.")

United States *v.* Prince Line, 220 Fed. 230, 232 (1915). (Agreement between all the shipowners engaged in the same trade as to the number of vessels each should operate, the dates of sailings, exchange of freight between lines, and rates of freight. The court said: "At the time it was formed the parties were in the trade and handled all the trade there was. No one was frozen out by their combination and there was no greater monopoly than existed before.") United States *v.* United States Steel Corporation, 223 Fed. 55 (1915).

2. The third view was one of the grounds of decision in the *Standard Oil Case*.[29] and was clearly announced in the opinion of the court. In stating the grounds for sustaining the findings and decision of the court below, the Supreme Court said:

"Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than

---

United States *v.* Eastman Kodak Co., 226 Fed. 62, 80 (1915). (". . . that the size and varied character of the enterprise do not of themselves constitute a violation of the statute. To this principle I assent. There is no limit in this country to the extent to which a business may grow, and the acquisitions of property in the present case, standing alone, would not be deemed an illegal monopoly; but when such acquisitions are accompanied by an intent to monopolize and restrain interstate trade by an arbitrary use of the power resulting from a large business to eliminate a weaker competitor, then they no doubt come within the meaning of the statute.")

United States *v.* American Can Co., 230 Fed. 859, 901 (1916), 234 Fed. 1019 (1916). (The court, though finding the American Can Co. was originally organized with the intent to exclude others, indulged in unlawful excluding practices, yet by reason of the fact that it had for a considerable period had no illegal purposes or used any excluding practices, a dissolution was refused, and the bill merely retained for a possible future action.)

United States *v.* Nelson, 52 Fed. 646, 647 (1892). ("Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion.")

See also Queen Ins. Co. *v.* State of Texas, 86 Tex. 250, 24 S. W. 397 (1893). (Combination of fifty-seven foreign insurance corporations doing business in the State of Texas.) Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973 (1894); Skrainka *v.* Scharringhausen, 8 Mo. App. 522 (1880).

[29] Standard Oil Co. *v.* United States, 221 U. S. 1, 75 (1911). In Texas Standard Oil Co. *v.* Adoue, 83 Tex. 650, 19 S. W. 274 (1892), where the combination was held illegal, the court, nevertheless, intimated that under certain circumstances it might appear that the same combination would be perfectly legal — thus indicating that the inference in favor of illegality arising from the combination's preponderant position in the industry might be rebutted. So in Jones *v.* Clifford's Ex'r, 5 Fla. 510 (1854), a combination of all the pilots serving a certain port, but merely for the purpose of apportioning their duties and earnings, was sustained. The facts rebutted any inference of an intent to exclude others. In Skrainka *v.* Scharringhausen, 22 Mo. App. 522 (1880), any intent to exclude others was rebutted by proof that the combination was necessary in order to stop a ruinous competition and promote the business.

would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce." [30]

Then the court justifies the decree below:

"Because *the prima facie presumption of intent to restrain trade, to monopolize and to bring about monopolization,* resulting from the act of expanding the stock of the New Jersey corporation, and vesting it with such vast control of the oil industry, is made conclusive, etc. . . ."

A little later the court, in referring to certain facts which were urged as rebutting any monopoly tendency, said:

". . . they might well serve to add additional cogency to *the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.*"

Practically all the cases where the combination has been held illegal at common law or under the Sherman Act, without actual proof of any excluding purposes or practices, may be explained consistently with the third view. Thus in the *Addyston Pipe Case* [31] the facts relied upon by the United States Supreme Court to hold the combination illegal were those quoted from the opinion of Taft, J., in the Circuit Court of Appeals. These disclosed merely a combination occupying a preponderant position in a given market, and effected by a contract which provided for the making of sales, and the fixing of prices by a central authority or committee. It may be assumed that this is a case where size and preponderant position in the business without any excluding purposes or practices, caused the combination to be illegal.[32] Neither the opinion of the Court

[30] This is a particularly strong statement, because in the Standard Oil Case the combination attacked and dissolved was the Standard Oil of New Jersey reorganized as a holding company in 1899. It was not a combination of competing units. The subsidiaries had been non-competing (except perhaps in a few instances not disclosed in the cases reported) since a time prior to the passage of the Sherman Act. It could fairly be said that the units combined in the Standard Oil of New Jersey in 1899 never had competed. Hence, the *prima facie* evidence of intent to exclude others arose from size and preponderant position in the industry brought about by combination without the suppression of any existing competition between the units combined.

[31] United States *v.* Addyston Pipe & Steel Co., 85 Fed. 271 (1898); 175 U. S. 211 (1899).

[32] Taft, J., in the Circuit Court of Appeals relied upon the illegal practice of the combination in suppressing competitive bidding on municipal contracts. This, the Supreme Court omitted all reference to, no doubt, upon the ground that if relied upon

of Appeal, nor the Supreme Court, in the least discloses whether the preponderant position is, in and of itself, a ground of illegality, or merely *prima facie* evidence of an excluding purpose to be carried out by illegal excluding practices. The result reached might go upon either ground. Many other cases are subject to a similar analysis.[33] So where the competing properties were bought up and united in a new corporation or board of trustees under the old managers, or under new managers, the size of the combination and its preponderant position in the business caused it to be held illegal.[34] But whether this result was reached because the size was,

solely, it would not justify a dissolution of the combination, and if not so relied upon it was unnecessary to mention it at all.

[33] Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173 (1871) (Combination of all the bituminous coal mines in a given district, and all but one at that time open which supplied bituminous coal in a large district); Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666 (1886) (Combination included all the salt producers in a large salt-producing territory); People *v.* Sheldon, 139 N. Y. 251, 34 N. E. 785 (1893) (Combination of "all the retail coal dealers in the city of Lockport except one"); People *v.* Milk Exchange, 145 N. Y. 267, 272, 39 N. E. 1062 (1895) ("Acting upon these by-laws, the defendant's board of directors have from time to time during its corporate existence fixed the price of milk to be paid by dealers, and the prices so fixed have largely controlled the market in and about the city of New York and of the milk-producing territory contiguous thereto. These facts are significant, and we are unable to escape the conviction that there was a combination on the part of the milk dealers and creamery men in and about the city of New York to fix and control the price that they should pay for milk"); Cummings *v.* Union Blue Stone Co., 164 N. Y. 401, 403, 58 N. E. 525 (1900) (Assuming blue stone quarrying and selling to be a business separate from stone quarrying and selling generally, the combination in question was of fifteen producers "of nearly the whole product of Hudson river bluestone, and of at least ninety per centum of the whole amount of such stone sold in the New York market to customers in various states east of the Mississippi river"); Emery *v.* Ohio Candle Co., 47 Ohio St. 320, 321, 24 N. E. 660 (1890) (Combination of "the manufacturers of 95 per cent of the star candles in that part of the United States lying east of the 114° of longitude west of Greenwich, or substantially all the territory east of the western boundary of Utah"); Nester *v.* Continental Brewing Co., 161 Pa. St. 473, 29 Atl. 102 (1894) (Combination of the forty-five brewers of the county of Philadelphia); Pocahontas Coke Co. *v.* Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264 (1906) (Combination of twenty coke manufacturing and producing corporations operating in the same field); Milwaukee Masons & Builders' Ass'n *v.* Niezerowski, 95 Wis. 129, 70 N. W. 166 (1897) (Combination of "nearly six-sevenths of the mason builders in Milwaukee"); Stanton *v.* Allen, 5 Denio (N. Y.) 434 (1848) (Combination among the whole, or a large proportion, of the proprietors of boats on the Erie and Oswego canals); Hoffman *v.* Brooks, 6 Ohio Dec. reprint, 1215 (1884) (Combination of all the tobacco warehousemen in Cincinnati); McBirney & Johnston White Lead Co. *v.* Consolidated Lead Co., 8 Ohio Dec. 762 (1883) (Combination of the white lead manufacturers of the United States west of Buffalo).

[34] Chapin *v.* Brown Bros., 83 Iowa 156, 48 N. W. 1074 (1891); Distilling & Cattle

in and of itself, a basis for illegality, or because it was only *prima facie* and unrebutted evidence of an intent to exclude others from the field, is not in the least made plain.

In a number of cases, it must be conceded, there was lacking direct proof of the preponderant position of the combination in the business.[35] In the *Standard Oil of Ohio Case*,[36] the record presented consisted of the petition, answer, and demurrer of the state. This record apparently presented no statement of the fact that the units combining in the Standard Oil Trust of 1882 were competing, nor did it disclose what capital they represented, or whether as combined they occupied a preponderant position in the industry. The court evidently took judicial notice of these important facts. It is clear that heretofore at least, courts have not been over particular about requiring records which showed the size and preponderant position of the combination in question. Yet it is not conceivable that these courts were holding illegal every combination however insignificant which eliminated competition between the units combined.[37] Hence some assumptions about size and preponderant position must be made in all cases where the combination has been held illegal. When such an assumption is made, the courts are absolutely silent as to whether the fact of size and preponderant position is, in and of itself, conclusive of illegality, or merely *prima facie* evidence of an excluding purpose.

3. Outside of the decision of the District Court in the *International Harvester Case*,[38] there have been no results and no *dicta* which clearly announce the first view. It must be conceded, however, that the language of the courts in a number of cases, which are, nevertheless, explainable on the ground that there was a *prima*

Feeding Co. *v.* People, 156 Ill. 448, 41 N. E. 188 (1895); Bishop *v.* American Preservers' Co., 157 Ill. 284, 41 N. E. 765 (1895); Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577 (1899).

[35] Judd *v.* Harrington, 139 N. Y. 105, 34 N. E. 790 (1893); Texas Standard Oil Co. *v.* Adoue, 83 Tex. 650 (1892); Hooker *v.* Vandewater, 4 Denio (N. Y.) 349 (1847); De Witt Wire-Cloth Co. *v.* New Jersey Wire-Cloth Co., 14 N. Y. Supp. 277 (1891); Anderson *v.* Jett, 89 Ky. 375 (1889); Vulcan Powder Co. *v.* Hercules Powder Co., 96 Cal. 510, 31 Pac. 581 (1892); Ford *v.* Chicago Milk Shippers' Ass'n, 155 Ill. 166, 39 N. E. 651 (1895); India Bagging Ass'n *v.* Kock & Co., 14 La. Ann. 168 (1859); Urmston *v.* Whitelegg Bros., 63 L. T. (N. S.) 455 (1890).

[36] State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279 (1892).

[37] See cases *supra*, notes 15, 16.

[38] 214 Fed. 987 (1914) (now pending on writ of error in the Supreme Court of the United States).

facie inference of excluding purposes and practices, sound as if the court regarded the mere elimination of competition between the units combined as illegal *per se*.[39] So, scattered through cases where there was a clear purpose to exclude others by illegal methods of competition,[40] or a combination of railroads or public service corporations where the field was not, as a matter of law, free to the public to enter,[41] or where the problem here discussed was not involved, will be found many general expressions which make it appear as if the court thought mere size in any business was inimical to the public interest.[42] One reason for such expressions is now fairly clear.

---

[39] See cases *supra*, notes 33, 34.

[40] See cases *supra*, notes 5, 6.

[41] See cases *supra*, note 12.

[42] People *v.* Chicago Gas Trust Co., 130 Ill. 268, 303, 22 N. E. 798 (1889). ("We concur in the following views expressed by the supreme court of Georgia in the case of Central R. R. Co. *v.* Collins, *supra*, [40 Ga. 582]: 'All experience has shown that large accumulations of property in hands likely to keep it intact for a long period are dangerous to the public weal. Having perpetual succession, any kind of a corporation has peculiar facilities for such accumulation, and most governments have found it necessary to exercise great caution in their grants of corporate powers. Even religious corporations professing, and in the main, truly, nothing but the general good, have proven obnoxious to this objection, so that in England it was long ago found necessary to restrict them in their powers of acquiring real estate. Freed as such bodies are from the sure bound to the schemes of individuals, — the grave, — they are able to add field to field, and power to power, until they become entirely too strong for that society which is made up of those whose plans are limited by a single life.'")

Woodbury *v.* McClurg, 78 Miss. 831, 835, 29 So. 514, 515 (1901). (In holding an attempt at power in a corporation to purchase stock in other corporations not competing with it, the court said: "That the powers attempted to be lodged in the Laurel Gravel Company would be illegal, if granted, we cannot doubt. They would make it a stupendous monster, capable of swallowing into its insatiable maw all the mercantile and manufacturing institutions of the entire country, because none of them would be in any competition with it in the gravel business.")

Richardson *v.* Buhl, 77 Mich. 632, 658, 43 N. W. 1102 (1889). ("Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals.")

State *v.* Standard Oil Co., 49 Ohio St. 137, 187, 30 N. E. 279 (1892). ("A society in which a few men are the employers and the great body are merely employees or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime.")

United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 324 (1896). (" . . .

They were made for the most part in the '80s and '90s. That was a time when the process of shifting from smaller units to larger and still larger units was carried on with extraordinary rapidity and persistence. The power which came from the sudden combination was new and uncontrolled by those who possessed it. It had been, and was being, terribly abused. Unlawful excluding practices were the regular accompaniments of combinations which occupied a preponderant position in the business. The consequence was that all such combinations received a bad name. Combination was, in and of itself, regarded as dangerous and contrary to the interests of society. Furthermore, the courts did not at all appreciate that they could draw a sharp line between combinations which had the excluding purpose and used unlawful excluding practices and those which did not. They did not at all perceive that size and preponder-

---

it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.")

Similar expressions occurred in the debate preceding the passage of the Sherman Act:

United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 319 (1896). (The court, referring to these debates, said: "Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whisky Trust and many others, and these trusts it was stated had assumed an importance and had acquired a *power* which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity."

Senator Sherman, opening the debate upon the Sherman Act, said (21 CONG. REC. 2457): "But associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination, commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president. . . .

"Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public, and, by the rule of both the common and civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals. It is this kind of a combination we have to deal with now."

ant position in the business might be made, in and of itself, *prima facie* evidence of the intent to exclude by the use of unlawful excluding practices and thus require the combination to meet that case against it. In the face of the unlawful use of the power of combinations and the profound obscurity as to where the line was to be drawn against them, it is not to be wondered at that courts, while reaching sound results, should have stressed and fulminated against combinations as such, and looked upon size as something inherently reprehensible. But even so, it is apparent that these same courts made no conscious decision between the rule that size and preponderant position were, *per se*, illegal, and the rule which made them merely *prima facie* evidence of an intent to exclude others by unlawful means. The latter view is entirely consistent with the fear of size in combination though not always with the heat with which that fear is expressed.

It should be observed also that the concession of the District Court in the *International Harvester Case* [43] that "there is no limit under the American law to which a business may not independently grow," is difficult to reconcile with the proposition that mere size and preponderant position is, in and of itself, illegal. It is useless to insist that mere growth is normal and combination abnormal. Both are normal methods of growth. Combination is normal up to a certain point so long as it is legal. No advance is made by saying it is abnormal because it is illegal, when its abnormality is in turn used to prove its illegality. If size is a menace in the case of growth by combination it is a menace where there is growth without combination. How the growth may occur is immaterial. On the other hand, if size and preponderant position in the business are by themselves not a test of illegality, but only evidence of the excluding purpose, then we may fairly make a difference between independent and normal growth (so called) and combination. The former might properly furnish no *prima facie* evidence of the excluding purpose. The latter would.

It is generally assumed that an agreement between competitors, together occupying a preponderant position in the business, that they will maintain a fixed price or a fixed minimum price at least, is illegal.[44] From this it has been argued that a mere combination

---

[43] 214 Fed. 987 (1914).

[44] Urmston *v.* Whitelegg Bros., 63 L. T. R. (N. S.) 455 (1890). It should be observed

of competing properties under one management without any agreement amounted to the same thing, and hence was, in and of itself, illegal.[45] The fallacy here is twofold. It is assumed that the fixing of the price is, in and of itself, illegal, when it may just as well be merely *prima facie* evidence of an assumption of the control of the market, and the purpose to exclude others. Indeed, the contract to maintain a certain price for any considerable period would hardly be sensible except upon these assumptions. But even if price-fixing agreements are, in and of themselves, illegal, it does not follow that the mere combination of the same units is, in and of itself, illegal. The vice of the price-fixing agreement is not merely the elimination of competition between the units. It is the assumption of the fact that the field of the business will not be free to others to enter, and the necessary inference from such an assumption that those combining have control of the market and intend to use their power to keep it. This may be so clear from the actual agreement that it is conclusive. When, however, the units combine without any agreement, the size and preponderant position of the combination in the business may be such as, *prima facie* to raise the inference that there is a purpose to exclude others and to use excluding practices. But there is nothing in any solemn agreement of the parties which in so many words declares that purpose. Hence the inference is rebuttable.

The *Dr. Miles Medical Co. Case*[46] clearly goes upon the ground that there was involved a combination of the manufacturer and distributing retailers which eliminated all competition between the retailers and maintained retail prices by agreement. It made no difference that the agreements which effected these objects were between the manufacturer and the retailers. The result was the same as if they had been between the retailers themselves. The

---

that it is difficult to find cases of this sort, for the reason that most of the contracts provide for the fixing of prices from time to time by a central authority.

[45] Opinion of the majority of the District Court in United States *v.* International Harvester Co., 214 Fed. 987, 999 (1914). ("*We think it may be laid down as a general rule that if companies could not make a legal contract as to prices or as to collateral services they could not legally unite*, and as the companies named did in effect unite the sole question is as to whether they would have agreed on prices and what collateral services they could render, when their companies were all prosperous and they jointly controlled eighty to eighty-five per cent of the business in that line in the United States. We think they could not have made such an agreement." Italics ours.)

[46] Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373 (1911).

combination by agreement, therefore, assumed a command of the market, so far as the articles sold were concerned, and the fixing of prices assumed that, with the aid of the manufacturer, all others could be excluded from the retail business, and all competition between the retailers in the combination suppressed. The holding of such a scheme illegal does not in the least support the general proposition that mere elimination of competition by combining properties under a new management, or combining properties and managers in a new industrial unit is, in and of itself, illegal. This is clear, because the court itself tacitly conceded the point made by Mr. Justice Holmes in his dissenting opinion that if title to the goods did not pass, and the retailers were mere agents of the manufacturer, the same restrictions as to price would be valid. But that would have been just as much an elimination of competition between retailers as existed already, and if such elimination of competition be illegal *per se*, the form would be immaterial. It is clear, therefore, that the illegality of the combination in question arose from the price-fixing arrangement and the control of the market by excluding others which it assumed, and not merely from the elimination of competition between the retailers.

4. It is important to observe that in drawing the line between good and bad labor organizations, the courts have been quick to approve combinations among labor units no matter what the size or preponderant position of the union may be, up to the point where the combination has unlawful and excluding purposes or indulges in unlawful excluding practices, so that the labor market is no longer free to other labor units or to employers. Every labor union eliminates competition between the units combined, and while there may be no agreement as to price, they all have the purpose to secure as high wages as possible. They are not, however, illegal for that reason.[47] The interest of society in the freedom of men to combine to better their situation by eliminating too much competition and the doing of business by larger collective units overcomes any interest of the public in having unrestricted competition among labor units. But let the labor union acquire the purpose of excluding all

---

[47] The Master Stevedores' Ass'n *v.* Walsh, 2 Daly (N. Y.) 1 (1867); Snow *v.* Wheeler, 113 Mass. 179 (1873); Thomas *v.* Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803 (1894) (*per* Taft, Circuit Judge); *contra*, Hornby *v.* Close, L. R. 2 Q. B. 153 (1867), not followed. See Collins *v.* Locke, L. R. 4 A. C. 674 (1879).

others except its members from the labor market, or let the union commence unlawful or unfair excluding practices and methods so as to make the labor market unfree, and the organization becomes illegal at common law,[48] and, if interstate commerce is involved, under the Sherman Act. That is the only line attempted. No court has suggested that the mere size of a union or its preponderant position in the labor market makes it, *per se*, illegal. It has not even been suggested that size and preponderant position is *prima facie* evidence of an intent to exclude others or to indulge in excluding practices. This is significant because such excluding purposes and practices are quite as likely to follow from the acquisition by a union of a preponderant position in a given labor market as they are from the acquisition of a similar position in industry by the owners or managers of combined properties. More than one court has noted that, so far as the legality of combinations is concerned, combinations of property, or property and managers, are on the same footing as combinations of labor units.[49] No difference has been pointed out by anyone. If there is any difference based upon the different standing of labor units to unite and managing units controlling property to unite, it would be entirely satisfied by permitting the labor units to combine to any extent without such combination giving rise to any *prima facie* inference of an intent to exclude others, while, at the same time, a combination of managing and property units occupying a preponderant position in the business, necessarily gives rise to such a *prima facie* inference and must sustain the burden of meeting the case so made against it.

5. Our view of the state of the authorities should not be concluded without considering the relation between a certain class of cases arising under the "due process" clause and under the Sherman Act. Suppose in cases where the question is whether an act of the Legislature is "due process" which interferes with the management of business by prescribing hours of labor or methods

---

[48] People *v.* Fisher, 14 Wend. (N. Y.) 9 (1835).

[49] Queen Ins. Co. *v.* State of Texas, 86 Tex. 250, 271, 24 S. W. 397 (1893). ("It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render services below a stipulated rate should be held contrary to public policy and void upon the same ground"); Sayre *v.* Louisville Union Benevolent Ass'n, 1 Duvall (Ky.) 143 (1863) (*semble*).

of payment of wages or the amount of wages, four judges out of nine are clear that the fundamentals of the social order are in jeopardy, and the act must be set aside. When these same judges come to draft or approve a judicial rule proscribing business organizations as illegal, they would consistently with their views on "due process" be inclined to impose only such restraint as seemed clearly to be called for to meet an undoubted evil — having in mind always the limits of such a judicial prohibition, and the avoidance of any rule founded upon doubtful or speculative economic data or results. Such judges might be expected to adopt as the test of illegality the existence of the excluding purposes or illegal excluding practices. Suppose in the same "due process" cases five judges are inclined to sustain the act. Three go upon a social bias in favor of the legislative restriction upon business. That is, upon balancing the interests, they regard the restriction upon business as for the general welfare. Two, however, if they exercised independent judgment in balancing the interests, would have regarded the legislation as opposed to the general welfare and inimical to the social order in accordance with the views of the minority. But they have felt bound to sustain the act in accordance with the rule that it must be upheld if any rational basis for it can be found after resolving all doubts in favor of the act. The moment these two come to consider the test of legality of business organizations they are released at once from the obligation of sustaining anything, if a rational basis can be found for it. With regard to a judge-made rule prohibiting certain business organizations, they are not only free to balance the interests for and against the prohibition involved, but they are subject to a counsel of caution that, when in doubt, they shall not extend the prohibition, but restrict it to cover only that generality of situations where the public interest is indubitably affected unfavorably.

B

In 1911 Mr. Brandeis in testifying before the Senate Committee,[50] said:[51]

"You may have an organization in the community which is so powerful that in a particular branch of the trade it may dominate by mere size. Although its individual practices may be according to rules, it may be, nevertheless, a menace to the community; . . ."

Mr. Brandeis' experience and authority have been so great, and his views before the Senate Committee are expressed so fully and frankly, that it is worth considerable trouble to ascertain just what were the grounds for this opinion, and how far they may require a holding by a court that mere size is, in and of itself, illegal, rather than *prima facie* evidence of illegal excluding purposes and practices.

1. It is clear from Mr. Brandeis' testimony that he does not condemn mere size because it, in and of itself alone, tends to exclude others from the business. The main thesis of his testimony is that size — and he is referring particularly to the size of our so-called American Trusts — results in such economic inefficiency that without any excluding practices and purposes they must fail, or at least lose their relative position in the market by reason of successful competition carried on by smaller and more efficient units. His language to this effect is so strong and to the point that it should be read. After setting out the records of certain trusts,[52] he says:

[50] Reference is here and in succeeding paragraphs made to the testimony of Louis D. Brandeis before the Committee on Interstate Commerce of the United States Senate, 62d Congress. It was given on December 14, 15, 16, 1911. Mr. Brandeis is referred to in the capacity in which he testified.

[51] Report of hearing before Senate Committee on Interstate Commerce, *supra*, 1167.

[52] Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1148: "Now, that mere size does not bring efficiency, does not produce success, appears very clearly when you examine the records of the trusts.

"In the first place, most of the trusts which did not secure a domination of the industry — that is, the trusts that had the quality of size, but lacked the position of control of the industry, lacked the ability to control prices — have either failed or have shown no marked success. The record of the unsuccessful trusts is doubtless in all your minds. One of the earliest of the trusts which did not secure control was the Whisky Trust. It was not successful. The plight of the Cordage Trust and of the Malting Trust was worse. Consider other trusts now existing, the Print Papers Trust (the International Paper Co.); the Writing-Paper Trust (the American Writing-Paper Co.); the Upper Leather Trust (the American Hide & Leather Co.); the Union Bag Trust, the Sole Leather Trust; those trusts and a great number of others which did

"I believe that the existing trusts have acquired the position which they hold largely through methods which are in and of themselves reprehensible. I mean either through methods which are abuses of competition or by such methods as were pursued by the steel corporation in paying ridiculous values for property for the purpose of monopolistic control.

"I am so firmly convinced that the large unit is not as efficient — I

---

not attain a monopoly and were therefore unable to fix prices have had but slight success as compared with their competitors. You will find daily evidence of their lack of success in market quotations of the common stock, where they are quoted at all, and the common stock of some has even fallen below the horizon of a quotation.

"Now take, in the second place, the trusts that have been markedly successful, like the Standard Oil Trust, the Shoe Machinery Trust, the Tobacco Trust. They have succeeded through their monopolistic position. They dominated the trade and were able to fix the prices at which articles should be sold. To this monopolistic power, in the main, and not to efficiency in management, are their great profits to be ascribed.

"Leaving the realm of industry for that of transportation, compare the failure of Mr. J. P. Morgan's creation — the International Mercantile Marine — and the astonishing success of the Pullman Car Co. The transatlantic steamship trade was open to competition, and could not, in spite of its price agreements, fix rates at an elevation sufficient to be remunerative. The Pullman Co., possessing an absolute monopoly, has made profits so large as to be deemed unconscionable.

"In the third place, take the class of cases where the trust has not controlled the market alone, but exerted control only through virtue of price agreements or understandings, as did the Sugar Trust and the Steel Trust. Those trusts paid large dividends, because they were able to fix remunerative prices for their product. But neither the Sugar Trust nor the Steel Trust has been able to hold its own against its competitors.

"Take it in the Sugar Trust. At the time of the Knight Case, a little less than twenty years ago, the Sugar Trust had practically the whole business of the country — I think the Supreme Court report shows something like 95 per cent. The company's reports to the stockholders of 1910, as I recall it, show that the company now controls only 42 per cent of the production of the country.

"The price agreements or understandings between the trust and its competitors had maintained the price, but they could not maintain for the trust its proportion of the business. The Sugar Trust's profits were maintained, as you so well know, not only through the price agreements, but through methods that were vulgarly criminal — through false weighing; through stealing of city water; through extensive railroad rebating.

"Then take the Steel Trust — that is a younger trust, only half the length of life of the Sugar Trust. But in the Steel Trust you have a similar manifestation of ebbing prestige. In spite of all this extraordinary power in the Steel Trust, the control of raw material, the control of transportation, the control of certain trade through its railroad associations, the control of other trade through its money power — and the addition of the Tennessee Coal & Iron Co. — in spite of all this the Steel Trust has been a steady loser in percentage of the iron and steel business of this country. And not only has it been a steady loser in the percentage of business in this country, but despite its ability to largely maintain prices, notably of steel rails, throughout that period, the later years show a diminishing return upon the capital invested as compared with the earlier years of the trust."

mean the very large unit — is not as efficient as the smaller unit, that I believe *if it were possible today to make the corporations act in accordance with what doubtless all of us would agree should be the rules of trade no huge corporation would be created, or, if created, would be successful.* I do not mean by that to say that it is not good to have the limitation [on size] in the law. What I mean is that *I am so convinced of the economic fallacy in the huge unit that if we make competition possible, if we create conditions where there could be reasonable competition, that these monsters would fall to the ground, that I do not consider the need of such a limitation urgent.*" [53]

It is quite obvious that the so-called trust cannot at the same time exclude others because of its size, and fail or decline by reason of the successful competition of others for the same reason. It cannot be that mere size alone tends to exclude others, and that size results in such inefficiency that others are able to enter the business easily and compete successfully. One or the other of these results must be discarded on the ground of inconsistency. As Mr. Brandeis' main thesis was that size breeds inefficiency and failure in the competitive struggle, it is fair to say that he does not place the "menace" of the trust which has no excluding purposes, and uses no excluding practices, upon the fact that mere size alone tends to exclude others. He would not argue that it was the usual effect of mere size to "overawe" the smaller competitor,[54] or to "make men hesitate to enter the field against it," or "to prevent the entrance of new capital and new competition into the industry." [55]

2. It has been urged that if five plants are supplying a given trade, the union of those plants tends to exclude others, because there will be no chance for anyone else to supply a demand which is already being adequately served.[56] This exhibits a child-like power of reasoning as to economic effect. Mr. Brandeis, of course, made no such point. His main thesis, that size was so inconsistent

[53] Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1170. Italics ours.

[54] Brief of Government in International Harvester Co. *v.* United States (now pending in the Supreme Court of the United States), 88.

[55] *Ibid.*

[56] Senator Sherman's speech, opening the debate on the Sherman Anti-Trust Act, 21 CONG. REC. 2460. ("But, they say, competition is open to all; if you do not like our prices, establish another combination or trust. As was said by the supreme court of New York [People *v.* North River Sugar Refining Co., 54 Hun (N. Y.) 354, 377], when the combination already includes all or nearly all the producers, *what room is there for another?*")

with efficiency that a trust without any excluding purposes or practices was an easy mark for independent competition, is utterly inconsistent with the contention that when all the units in a given business have combined, there is no room for anyone else.

3. Mr. Brandeis does suggest [57] that "the mere *power of endurance* of the large company would be sufficient to give it mastery of the field." He was speaking at the time of the Tobacco Trust. The context is as follows:

> "I found, for instance, in the tobacco company this situation — and it was one of the many objections to the plan of so-called disintegration — that the American Tobacco Co. in various departments were controlling about 40 per cent or over of the American business. We found there that in this way the American Tobacco Co. alone, and each one of the other two large companies, would control a proportion of the total business of the country in certain departments of the trade which was from one to seven times the aggregate of the business of all of the independents. Now, I believe that fair competition is not possible under those conditions, because the mere power of endurance of the large company would be sufficient to give it mastery of the field."

The purport of this is somewhat vague. If excluding practices are used, or if from the mere size of the Tobacco Company units which were provided for in the disintegration plan referred to, there was still a *prima facie* inference that excluding practices would be used, then of course the "trust" would have a "power of endurance" which would keep out its competitors, and give it mastery of the field. This is probably Mr. Brandeis' meaning, for his main thesis is that mere size without excluding purposes or practices is a source of economic weakness and operates to give competitors an advantage based on efficiency. This is entirely inconsistent with the view that mere size produces any mastery of the field. Others, however, may insist that the resources of a so-called trust are so great that the combination could practice universal price-cutting below cost in order to destroy all rivals and exclude others. The reserves, however, of such an organization are not necessarily proportionately larger than those of smaller units. It may fairly be denied that there are any such resources in the hands of a so-called trust as will enable it to keep up universal price-cutting below cost

57 Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1175. Italics ours.

on a country-wide basis longer than a smaller unit can keep up the same price-cutting in the smaller field where it operates. Of course no court can deal with the question of legality on the fortuitous basis of what proportion of reserve capital one corporation may have in comparison with that of its rival or possible rival. Even if one could imagine a trust punishing itself by universal price-cutting to the extent assumed, how is the public injured? Surely not by the introduction of prices so low that no one cares to enter the business or to stay in the business and the retention of such prices in general whenever any competitor appeared in any part of the country.

4. Perhaps it will be said that the large combination will absorb all the best talent in the community for the business, and so make competition impossible. This position, however, is equally inconsistent with Mr. Brandeis' main thesis. If such were the fact, then the "trusts" would not fail for inefficiency or be subject to successful competition from new capital. Furthermore, there will still be infinite dispute as to whether the "trust" does, in fact, secure the best talent. If the subject were investigated able men could no doubt be found to testify that the more progressive and inventive minds arise among the independent smaller units, and that the large unit tends to conservative methods, lack of initiative, and want of inventive power — indeed, that it is subject to all the evils of a bureaucracy. For instance, between the independent telephone engineers and inventors and the engineers and inventors of the Bell system will be found a long standing dispute as to the merits and abilities of the men in each group. Furthermore, it may well be doubted whether efficiency and experience can be regarded as limited to any such degree that it can be "cornered." [58]

5. Combination resulting in a unit occupying a preponderant position in the business has been objected to because it tends unduly to enhance prices. The idea is that there is a necessary connection between size and high prices. This rests, of course, upon the belief that there is a necessary connection between mere size (without any excluding purposes or practices) and the exclusion of others from the business. When the latter is exploded, does anything re-

---

[58] Thus Mr. Justice Day, sitting as a Justice in the Circuit Court of Appeals in the Cash Register Case, 222 Fed. 599, 619 (1915), observed that "possibly, efficiency is so abundant that in experience there never will be as there never has been such a monopolizing."

main of the former? Any idea that there is a *necessary* connection must certainly be abandoned. It is significant that when Mr. Brandeis was asked whether he would regard 15 per cent return on $10,000,000 of capital an extortionate profit, he not only refused any percentage as a test of fair profit, but plainly indicated that the only test of extortionate prices which he had in mind was the fact that the market was unfree; — in short, that the unit fixing the prices had the excluding purpose and used unlawful excluding practices. He said:[59] [Italics ours]

"In a business which is a competitive business, I believe we can safely leave the percentage of profit to that which the business will bear, and I think it is in the interest of business and the interest of the community to let people who are conducting business which is competitive understand that *there is no profit too great to be approved, if it is the result of the exercise of brains and character, under conditions of industrial liberty.* I think we want to let people understand that it is not 15 or 20 or 30 or 100 per cent that we condemn. We ought to congratulate people in making that much, and we ought to congratulate ourselves that they are making it, if it is made *under conditions of natural competition.* And it is only *when conditions are constrained* that we have any interest in how large returns are made."

6. The difficulty in determining what size is illegal is a strong argument against making size, in and of itself, a judicial test of illegality. Whether the unit attacked occupies a preponderant position in the business may possibly be ascertained like other ultimate facts to which legal consequences attach. But in many cases it certainly cannot be known in advance. It will depend upon the conditions of each business and upon surrounding circumstances of an intricate and changing character. It may be that in one industry a single unit doing 25 per cent of the business might occupy a preponderant position, while in another, one with 40 per cent might not. When asked by the Senate Committee what limit he would place on the size of corporations, what standard he would fix, and how he would phrase it, Mr. Brandeis said:[60]

"I do not think that I am able at this time to state the exact provision which I should make. I feel very clear on the proposition, but I do not

[59] Report of hearing before the Senate Committee on Interstate Commerce, 1245.

[60] *Ibid.*, 1174.

feel equally clear as to what machinery should be invoked or the specific provision by which that proposition could be enforced."

Then he goes on to say: [61]

"I am very clear that the maximum limit could not be properly fixed in dollars, because what would be just enough for one business would be far too much for many others."

Apparently he favored some standard which took account of the percentage of the market controlled. But even here he was vague as to what percentage would be illegal. He was clear that 10 per cent would be legal, but that 40 per cent might not.[62] Mr. Brandeis' difficulties in dealing with the standard of size for business and industrial units where the power of the legislature was involved, are surely not diminished where the power of the court is invoked. The difficulty is not solved by being embalmed in any such phrase as "preponderant position in the business." It is clear that whether a business occupies such a position is a good deal like determining whether anyone has been guilty of negligence. No one can tell what the legal consequences of acts may be until the trial is had, and the courts are through. Can the control of property engaged in industrial and commercial pursuits and operating in a delicately adjusted field from day to day stand being faced at all times with such a test of legality? If such a test were adopted, the motive to err on the safe side in order to avoid indictment might so impede the shift from smaller to larger units as to result in positive public evil. Where the violation of a highly penal statute like the Sherman Act is involved, is it fair to subject business men to indictment for crime upon an issue which involved merely the size of the business which they went into together?

The courts have had at least one unfortunate experience in making property rights depend upon a question of size. When a non-exclusive power was created in A. to appoint among a class with a gift in default of appointment to the class, A. must appoint something to each one. If A. appointed too small an amount to one, it was treated in a court of equity as no appointment at all. It was called an illusory appointment. This was a very pretty doctrine sentimentally, but it made litigation every time any appointee got a

[61] Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1175.

[62] *Ibid.*, 1175.

considerable amount less than the others, and no test of what was a substantial appointment could ever be worked out. It always depended on the size and character of the estate and surrounding circumstances. The doctrine was spoken of with contempt by judges and writers who had had any experience with it, and was finally abolished by act of Parliament.[63] In this country courts have refused to recognize it.[64] There are the same fundamental objections (many times magnified) against putting the invalidity of great business organizations upon any test of size alone.

It will be said, however, that if the line as to size can be drawn for the purpose of determining what is *prima facie* evidence of the intent to exclude others, it can be drawn as a test for illegality itself. It is not at all denied that such a line can be drawn. The argument is that when drawn as a test of illegality, it is one which the courts should not draw, but as evidence of an ultimate fact of excluding purpose, it may be considered alone or with other evidence for what it is worth, subject like other evidence to have the inferences arising from it rebutted.

7. It is a fair inference from Mr. Brandeis' testimony that he did not draw any line between combinations of labor units and combinations of managing units, so far as illegal attempts at monopoly were concerned. He was asked:[65]

"Do you regard the closed shop in labor as a tendency toward monopoly, *just as you do a combination of plants?* "

to which he answered:

"Yes."

---

[63] "Powers in Trust," John Chipman Gray, 25 HARV. L. REV. 1, 26: "But the rule as to illusory appointments is unique in the law. Other rules of doubtful character have found defenders or apologists, but no one has had a good word for this. It has been condemned in the most unmeasured terms by judge after judge; by Sir Richard Pepper Arden (afterwards Lord Alvanley), M. R., in Spencer *v.* Spencer, 5 Ves. 362 (1800); Kemp *v.* Kemp, *ibid.*, 849 (1801); by Sir William Grant, M. R., in Butcher *v.* Butcher, 9 Ves. 382 (1804); and by Lord Eldon, C., in Bax *v.* Whitbread, 16 Ves. 15 (1809), and Butcher *v.* Butcher, 1 Ves. & B. 79, 94, 96 (1812).

"This state of things was so intolerably inconvenient and mischievous that a statute was passed abolishing the rule as to illusory appointments." [St. 11 Geo. IV. & 1 Wm. IV. c. 46 (1830).]

[64] Graeff *v.* DeTurk, 44 Pa. 527 (1863); Hawthorn *v.* Ulrich, 207 Ill. 430, 69 N. E. 885 (1904).

[65] Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1180.

It seems hardly conceivable that Mr. Brandeis would have made mere size and preponderant position in a labor market of a given labor union, in and of itself, a test of illegality. Indeed, it seems generally accepted that labor unions can be as large as possible and occupy as preponderant a position in the labor market as size can give, and that they only become illegal when they have the excluding purposes or indulge in unlawful excluding practices.[66] Why, then, it may be asked, make the size of combinations of managers and their properties, or of the properties alone, in and of itself, illegal?

8. It will be argued, however, that if size is not in and of itself illegal, then if 100 per cent of all the property and managers engaged in a given industry unite and have no excluding purposes or indulge in no unlawful excluding practices, the combination would be valid, although, until others could come into the field, it would have an absolute monopoly.

In meeting the argument based upon this extreme case, we must first assume that there is no such control of natural resources or strategic points as practically to exclude others, or to make their entrance into the business unusually difficult. The case put must be looked at as one in which the field is really free to others to enter. With this condition properly emphasized the combination of 100 per cent of all those engaged in a given business presents no special feature except the fact that for some time, not at all clearly defined, but upon our assumption of a free field, comparatively short, the combination could, if it chose, fix such prices as it pleased. This is offset by Mr. Brandeis' view that size alone without any excluding purposes, practices, or surrounding conditions is quickly self-destructive by reason of the inefficiency of the combination and the resulting successful competition. It is also offset, in part at least, by the natural motive to sell cheaply enough to cause the public to buy, and at the same time not unduly to encourage others to come into the business. Such prices would be fair prices because they would be the highest possible, taking into account the proper reaction from the fact that the market was free to others.

Suppose, however, the 100 per cent combination did continue for an appreciable term and attempted, in disregard of these natural motives, to enter upon a debauch of exorbitant and monopoly prices,

[66] See cases, *supra*, notes 47–49.

regardless of consequences, during such period as was possible. That would clearly be contrary to the public interest. Nevertheless, the more outrageous the conduct of the temporary monopoly the quicker would be the relief by the entry of others and the greater the load of unpopularity which the combination would have acquired. The question is: Should the public interest be left thus to suffer temporarily in this largely problematical case, rather than that every combination of capital which approached the vague standard of a preponderant position in the business should be subjected to the terrors of indictment and uncertainty as to the legality of its business organization, and that every combination which had a clear preponderant position in the business, because it had from 40 per cent to 80 per cent of the market should be *ipso facto* illegal when it had no such power over prices as in the hypothetical case put? It is submitted that the hypothetical case of the 100 per cent combination which used its position for however short a time to charge exorbitant prices, should be left to be dealt with by the legislature, or by the courts when that case arises. The result which the court might conceivably feel obliged to reach in such a case is no argument in favor of the court drafting a judicial test of illegality for all combinations based upon size and preponderant position in the business, and that alone.

In the same way many arguments in favor of mere size being made the test of illegality, founded upon some extraordinary hypothetical action of a combination with a preponderant position in the business, may be met. For instance, it is said that a trust might withdraw "temporarily from the market" so that prices would rise, or it might release "an unusual quantity of goods upon the market" so that prices would fall.[67] There are limits to be observed by the courts in the placing of restrictions upon the legality of business organizations which certainly affect the freedom of action of all in order to take care of a few problematical and remotely probable situations.

9. The effort to make mere size a test of illegality always includes the argument that preponderant position in the business confers such power and opportunity for illegal excluding practices, and the danger of their being used is so great that the entire combination

[67] Brief of the Government in International Harvester Co. *v.* United States (now pending in the United States Supreme Court), 86.

should be condemned on the basis of size only. Obviously, however, if the mere possession of the power to commit a wrongful act were itself a wrong, the number of unlawful status would increase to the extent of the number of possible natural and artificial persons multiplied by the number of possible offenses. Even to be guilty of an attempt to commit a crime, the mere power is not enough. The actor must take substantial steps in the direction of the criminal act. Certainly the mere possession of power to commit a wrongful act can only become a wrong when the wrongful use of the power is so likely to follow from its possession, and is so difficult to reach, in and of itself, that the mere possession of the power must be condemned as in itself illegal. No court has yet said, and it is believed no court should, in view of our recent experiences, undertake to say, that it is necessary to hold the mere possession of the power to exclude others by illegal practices itself illegal, in order to prevent the unlawful use of that power. It is enough to point to the combinations occupying a preponderant position in different industries which the government has recently investigated to make clear that since business has discovered that excluding purposes and practices are illegal, there has been an obvious tendency to abandon them entirely. This appears particularly in the case of *United States* v. *Keystone Watch Case Co.*,[68] *United States* v. *United States Steel Corporation*,[69] and *United States* v. *American Can Co.*[70] The *International Harvester Co.*[71] appears never to have indulged in any unlawful excluding practices, or to have had any excluding purposes.

10. In Mr. Brandeis' testimony only one suggestion has been found in support of his opinion that a combination occupying a preponderant position in the business may, by reason of its size alone, be "a menace to the community." It is as follows: [72]

"I have considered and do consider that the proposition that mere bigness cannot be an offense against society is false, because I believe that our society, which rests upon democracy, cannot endure under such conditions. Something approaching equality is essential."

[68] 218 Fed. 502 (1915).

[69] 223 Fed. 55 (1915).

[70] 230 Fed. 859; 234 Fed. 1019 (1916).

[71] 214 Fed. 987 (1914).

[72] Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1167.

This is an echo of views which have been expressed by courts from time to time.[73] The trusts, it is said, take opportunity from independent business men. They make an industrial world of employees instead of independent business men. They menace equality of opportunity and consequently that ideal of democracy which rests upon such equality.

A good deal involved in this view does not square with Mr. Brandeis' main thesis that the trust which has only size is so inefficient that it must fail or decline in the face of the successful competition of smaller and more efficient units. If the bigness which, *ex hypothesi*, menaces democracy is also a menace to itself, how can it menace democracy, or the privilege of doing business in the smaller units? The fact is that when the mind is convinced that excluding purposes and practices can be separated from size and suppressed apart from holding mere size illegal, the substantial objections to size, as such, disappear. All that is left is a residue of fear and bias — fear that large combinations may at any time resort to a use of their power to exclude others from the business; bias against size which took root during the period when size and excluding purposes and practices were inseparable. All reasonable concessions are made to this "fear" and this "bias" when the preponderant position of any combination is made *prima facie* evidence of its excluding purposes and practices and hence of its illegality. It is not at all clear from Mr. Brandeis' testimony in 1911 that he would have rejected such a position if it had been presented to his mind.

In some cases, no doubt, a bias against size may be founded upon an individual preference for the simplicity of the social and industrial order of the frontier. That may be put down as incurable. Old men may hark back to the days of their youth, but courts cannot contribute to the running of the social order of the present and the future by confining themselves to the use of such important improvements as the horse cars and gas mains of the 70's. The simplicity of the frontier is now largely prehistoric. The combinations which are, and indeed must be, permitted mean substantially an industrial world of employees rather than of independent individuals engaged in business. Under any restriction as to size, which the courts could possibly pronounce, the ideal of a frontier

[73] Some of these cases have been collected, *supra*, note 42.

order of society with its equal opportunity for all would not conceivably be reached. It is unthinkable that any court should settle the size of industrial units by a judicial fiat which was founded only in a sentimental bias in favor of the simplicity of life as it existed in the frontier days of half a century ago.

11. Finally, it is important to observe that in the making of a prohibition upon the size of combinations and business units, the courts are in a very different position from the legislature, and that one who addresses a legislative committee on the subject very properly enters upon an expression of views and proposals which the court in considering the same subject could not entertain. The legislature may mark out lines as to size as it pleases with such qualifications and exceptions as it deems expedient. In so doing it may go upon views of economic fact which are speculative. It may even promulgate a rule founded upon the passion and prejudices of a majority.

The courts, on the other hand, in fixing the size of industrial and commercial units, must, from the nature of their function, promulgate a prohibition which is couched in general terms, universally applicable, and without illogical or detailed exceptions. It must run the chance of being too liberal and letting in some results concededly against the public interest, which the legislature must deal with in detail, rather than draw the line too tight and unduly embarrass the freedom of managers in the industrial and commercial world in their determination of the most efficient and economically proper unit of size. It must beware of basing a restriction upon economic conclusions which are uncertain and speculative, and which may be founded upon passion and prejudice rather than knowledge of essential facts and sound analysis of the situation.[74]

The making of the rule against perpetuities is a fair example of the observance by a court of these limitations. From the time that

[74] Ontario Salt Co. *v.* Merchants Salt Co., 18 Grant (U. C.) 540, 549 (1871), Strong, V. C., in upholding a combination of salt producers, said: "Did I even think otherwise than I do, that this arrangement was injurious to the public interests, I should hesitate much before I acted on such an opinion, for I should feel that I was called on to relieve parties from a solemn contract, not by the mere application of some well-established rule of law, but upon my own notions of what the public good required — in effect to arbitrarily make the law for the occasion. I can conceive no more objectionable instance of what is called judge-made law, than a decision by a single judge in a new and doubtful case that a contract is not to bind on the ground of public policy."

the rule began to take shape as a result of Lord Nottingham's decision in the *Duke of Norfolk's Case*,[75] the English courts have constantly adopted liberal boundary lines so as to permit testators to do what they had been accustomed to do up to the point where the courts were certain that the owner of property was going too far in the creation of remote limitations. In the *Duke of Norfolk's Case*, which was the beginning of this process, there was a fundamental struggle to make a far stricter rule — to draw an artificial line between future interests in terms after a life estate, and future interests in terms taking effect at the death of the first taker, but after an absolute interest. Indeed, it was only by the narrowest margin that this step was avoided and Lord Nottingham's view adopted.[76] The generalization thus worked out permitted Peter Thellusson to direct an accumulation of his estate for a period measured by a considerable number of lives in being at his death.[77] He could, as a matter of fact, have provided for an accumulation for the period of these lives and twenty-one years thereafter. The result thus reached under the rule against perpetuities was regarded as contrary to the public interest, and the Thellusson Act was passed to control accumulations for the future. In this country some legislatures have thought the common-law rule against perpetuities too liberal, and have made the limit two lives in being, without any term of twenty-one years.

Apply to our problem the vision and judgment which Lord Nottingham brought to the creation of a test regarding the validity of future interests, and our conclusions are not in doubt: When the courts took the stand that a combination occupying a preponderant position and having excluding purposes or using unlawful excluding practices was illegal they took sure ground and have had no reason to regret it. They will equally be on safe ground if they hold that size and preponderant position are *prima facie* evidence of the pur-

---

[75] 3 Ch. Cas. 1 (1682).

[76] In the Duke of Norfolk's Case, 3 Ch. Cas. 1, Lord Chancellor Nottingham was assisted by Lord Chief Justice Pemberton, Lord Chief Justice North, and Lord Chief Baron Montague. The Lord Chancellor differed from these judges, and entered a decree in accordance with his own opinion, and disregarded the opinions of those whom he had asked to assist him. After Lord Nottingham's death, Lord North became Lord Keeper of the Great Seal, and upon a bill of review he reversed the decree of Lord Nottingham, but on appeal to the House of Lords the decree of the Lord Keeper was reversed and the decree of the Lord Chancellor affirmed.

[77] Thellusson *v.* Woodford, 11 Ves. 112 (1805).

pose to exclude others which places upon the combination the burden of rebutting the inference of excluding purposes and practices. But when the courts undertake to say that mere size alone is against the public interest they enter the realm of uncertainty and speculation both as to economic facts and results. It is the realm where law-making "may degenerate into the mere private discretion of the majority of the court as to a subject of all others most open to difference of opinion and most liable to be affected by changing circumstances," [78] and where the quaint language of an English judge becomes applicable:

"Public policy is an unruly horse, and when once you get astride it, you never know where it will carry you." [79]

In the decades from 1880 to 1900 a great fear of the power of new combinations spread throughout the United States. The power which came from combination had been, and was being, abused. Unlawful excluding purposes and practices were the regular accompaniments of combinations which occupied a preponderant position in the business. All such combinations, therefore, received a bad name, and combination was, in and of itself, distrusted. Since perhaps 1910 it has become each year more apparent that the evil side of combination was the existence of the excluding purposes and the use of unlawful excluding practices. Each year it has become more apparent that these excluding purposes and practices may be eliminated, and the freedom of the market secured, without touching the combination itself. It has become more and more apparent that the transition of business units from smaller to larger, and then to still larger units is a desirable side of combination, and a movement in which the public has a vital interest. It has become more and more apparent that some experiment was necessary to determine what was the most efficient size for business units in a given branch of industry, and that where the field is really free to others to enter, the determination of the question of proper size may be left to the play of economic forces. If these observations are sound, they clearly point to the drawing of the line between good and bad

---

[78] Comment on Hilton *v.* Eckersley, 6 E. & B. 47 (1855) by the editors of SMITH'S LEADING CASES, Mr. Justice Willes and Mr. Justice Keating (4 ed. vol. 1, p. 286).

[79] *Per* Burrough, J., in Richardson *v.* Mellish, 2 Bing. 229, 252 (1824).

trusts at the place where the excluding purposes or unlawful excluding practices commence. It is sufficient protection to the public and a sufficient concession to the possible abuse of power by combinations, and any bias against them, that every combination having a preponderant position at the time it is organized must sustain the burden of rebutting a *prima facie* inference of excluding purposes and unlawful excluding practices.

Albert M. Kales.

HARVARD LAW SCHOOL.